No. 84-636

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In the Supreme Court of the United States

OCTOBER TERM, 1984

DELLA BROWN, CONSERVATOR OF DAN C. BRISCOE,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND RESPONDENTS SIEFKES, SHIELDS, THOMPSON, AND BRITTON IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the doctrine of *Feres* v. *United States,* 340 U.S. 135 (1950), bars a Federal Tort Claims Act suit against the United States for the alleged failure of military personnel to prevent a tort committed on a military base by off-duty members of the National Guard against another off-duty Guard member.

2. Whether National Guard officers may be sued under 42 U.S.C. 1981 and 1983 for their alleged failure to prevent or properly investigate the tort.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 739 F.2d 362. The memoranda and orders of the district court (Pet. App. 18-36) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 37-38) was entered on July 20, 1984. The petition for a writ of certiorari was filed on October 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the mother and conservator of Dan C. Briscoe, a former enlisted member of the Nebraska National Guard. She alleges that Briscoe, who is black, was the

victim of a racially motivated intentional tort. This tort consisted of a "mock lynching" carried out by other National Guard enlisted men while they and Briscoe were participating in federally mandated annual training exercises on a federal military base. It occurred on the base during an afternoon party on a holiday. Petitioner was on nonduty status for the holiday at the time. Pet. App. 3.

The incident was investigated by a National Guard captain, who conducted interviews and took sworn statements from the participants. His report concluded that "the mock hanging took place at a party with excessive drinking, that it was a crude, ill-advised prank, but without intent of bodily harm, and that Briscoe participated in the prank voluntarily and remained at the party drinking after the incident" (Pet. App. 4). The report further stated that Briscoe indicated that he "was not interested in making any formal complaint," and his requests for pay, medical benefits, and an opportunity to discuss the incident with a race relations officer "received prompt attention" (*ibid.*).

Briscoe subsequently became depressed and attempted suicide. The attempt, which occurred in 1977, left him seriously injured. In 1979, petitioner brought suit in the United States District Court for the District of Nebraska. She sought damages from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, alleging that federal military personnel at the base had been negligent in failing to prevent the mock lynching. Petitioner also sought damages from certain of Briscoe's superior officers in the National Guard and fellow enlisted members of the Guard under 42 U.S.C. 1981 and 1983. She claimed that the superior officers were liable for negligence in failing to prevent the incident and in failing properly to investigate the incident, and that the enlisted men were liable for participating in the incident itself. Pet. App. 2-5.

The district court granted summary judgment for all the defendants (Pet. App. 18-35). The court of appeals affirmed in part and reversed in part (*id.* at 1-17). The court of appeals ruled that the FTCA claim against the United States was precluded by the doctrine of *Feres* v. *United States,* 340 U.S. 135 (1950), which held that the government may not be sued by a serviceman under the FTCA for alleged torts incident to military service. The court of appeals explained (Pet. App. 15):

> The claim that various officers negligently failed to prevent the incident directly calls into question the disciplinary decisions of Briscoe's superior officers. Presumably what would be litigated is whether the officers should have issued some type of order, or otherwise taken disciplinary action, to prevent any type of racially motivated actions. Under the *Feres* doctrine such a lawsuit cannot be maintained — it strikes precisely at the type of command relationship between a service member and his or her superior officers that is at the heart of the military disciplinary structure. Similarly, the claim that various officers failed to perform a proper investigation strikes directly at military decisionmaking with respect to a disciplinary matter. The *Feres* doctrine will not permit a court to second-guess the military decisions as to how an investigation into a disciplinary matter should have been conducted.

The court of appeals ruled that the policies underlying the *Feres* doctrine similarly precluded petitioner's statutory claims against the individual superior officers. The court of appeals noted that in *Chappell* v. *Wallace,* 462 U.S. 296 (1982), this Court held that a serviceman has no implied constitutional cause of action for damages against a superior officer (see *Bivens* v. *Six Unknown Named Agents of*

Federal Bureau of Narcotics, 403 U.S. 388 (1971)), and reasoned as follows (Pet. App. 10):

> We are unable to find * * * a reasoned distinction for the purposes of the *Feres* doctrine between *Bivens*-type actions under the Constitution and actions brought under a federal civil rights statute. We cannot say that the policies supporting the civil rights statutes are any stronger than those supporting constitutional rights; nor can we say that military discipline will be any less affected by a civil rights claim than a constitutional claim. Hence, we reject [petitioner's] argument that the *Feres* doctrine can never be a bar to a suit brought under 42 U.S.C. §§ 1981 and 1983.

The court of appeals reinstated petitioner's claims against the enlisted men who allegedly participated in the incident. The court explained that "[u]nlike the other two claims, this claim does not involve the command relationship between a service member and his or her superiors, nor does it involve military decisionmaking with respect to disciplinary matters" (Pet. App. 15).

ARGUMENT

1. In *Shearer* v. *United States,* 723 F.2d 1102 (1983), cert. granted, No. 84-194 (Oct. 29, 1984), the Third Circuit reversed the dismissal of an FTCA suit brought by a deceased serviceman's survivor who alleged that the government negligently failed to prevent another serviceman from murdering the decedent. The murder occurred while both servicemen were off duty and off the base. The Third Circuit rejected the government's arguments that the claim was barred by both the *Feres* doctrine and the intentional tort exception to the FTCA, 28 U.S.C. 2680(h). This Court granted the government's petition for a writ of certiorari in *Shearer* to consider both the *Feres* issue and the interpretation of Section 2680(h).

For purposes of the *Feres* doctrine, petitioner's claim is at best indistinguishable from — and may be weaker than — the claim of the plaintiff in *Shearer*. See 84-194 Pet. 15-16 n.8.[1] Accordingly, for the reasons stated in our brief in *Shearer* (at 24-32),[2] the courts below were correct in holding that petitioner's claim was barred by *Feres*. As the court of appeals explained (Pet. App. 15), petitioner's claim directly challenges the decisions that military personnel made with respect to the supervision and discipline of enlisted men. It therefore implicates the policies that form the basis of the *Feres* doctrine. Consequently, while it is appropriate for the Court to hold the petition pending the decision in *Shearer*, a reversal of the Third Circuit's holding on the *Feres* issue would appear to necessitate the conclusion that the decision of the court below is correct.

Petitioner's claim is also indistinguishable from the claim of the plaintiff in *Shearer* for purposes of the intentional tort exception. Accordingly, for the reasons stated in the portion of our brief in *Shearer* dealing with Section 2680(h), petitioner's claim was barred by the intentional tort exception as well. See 84-194 U.S. Br. 9-24. Section 2680(h) provides that the FTCA "does not apply" to "[a]ny claim

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[1]The only arguably material difference between the claims is that the incident that gave rise to the injury to Briscoe occurred on a military base. While we do not consider this factor to be of any significance in this context — for the reasons stated at pages 30-31 of our brief in *Shearer* — it is possible that this factor would have caused even the Third Circuit to rule that petitioner's claim was barred by *Feres;* in explaining why the *Feres* doctrine did not apply in *Shearer*, the Third Circuit emphasized that the murder occurred off the base. See 723 F.2d at 1105, 1106. For this reason, we do not agree with petitioner's assertion (Pet. 10-11) that the decision below conflicts with the Third Circuit's decision in *Shearer*.

[2]We have served copies of the brief and petition in *Shearer* on counsel for petitioner.

arising out of assault [or] battery"; petitioner's claim "arises out of" the assault and battery committed against Briscoe within the plain meaning of that phrase. Thus, even if this Court reverses in *Shearer* solely on the basis of Section 2680(h) and does not reach the *Feres* issue, petitioner would not be entitled to any relief.[3]

2. The court of appeals' ruling that petitioner cannot seek damages from Briscoe's superior officers under 42 U.S.C. 1981 and 1983 is correct, is unrelated to *Shearer*, and is consistent with the decision of the only other court of appeals that has considered a similar issue. See *Mollnow* v. *Carlton*, 716 F.2d 627, 630-632 (9th Cir. 1983), cert. denied, No. 83-994 (Mar. 19, 1984) (suit under 42 U.S.C. 1985(3)). The petition should accordingly be denied as to Question 2 of the questions presented irrespective of this Court's decision in *Shearer*.

In *Feres*, this Court ruled that the FTCA does not authorize servicemen's suits against the government based on torts committed by fellow servicemen incident to military service. The Court has stated that "[i]n the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline' " (*United States* v. *Muniz*, 374 U.S. 150, 162 (1963), quoting *United States* v. *Brown*, 348 U.S. 110, 112 (1954)). For at least two reasons, the court of appeals' interpretation of Sections 1981 and 1983 follows *a fortiori* from *Feres*.

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[3]Such a disposition of *Shearer* would, by reversing the Third Circuit's judgment, deprive the Third Circuit's decision in *Shearer* of all precedential effect and thereby eliminate any arguable conflict (see page 5 note 1, *supra*) between the Third Circuit and the court below.

First, as this Court remarked in *Feres* (340 U.S. at 138-139), there are indications in the FTCA that Congress contemplated that servicemen would sue the government for torts arising out of military service;[4] there are no comparable indications in Sections 1981 and 1983. Indeed, it is most unlikely that the Reconstruction Era Congress that enacted those statutes envisioned that they would authorize suits by servicemen against their superior officers. Compare *Butz* v. *Economou*, 438 U.S. 478, 500-501, 504 (1978) (principles governing immunity in *Bivens* actions also apply to suits under Section 1983), with *Chappell* v. *Wallace*, *supra* (servicemen may not bring *Bivens* actions against their superior officers). Second, the FTCA permits suits only against the government; petitioner's suit under Sections 1981 and 1983 seeks damages from the individual respondents in their personal capacities — a form of relief much more likely to interfere with the " 'peculiar and special relationship of the soldier to his superiors' " and to have a disruptive " 'effect[] * * * on discipline.' " See *Chappell*, 462 U.S. at 300.

Moreover, it is clear that petitioner's claims under Sections 1981 and 1983 should be dismissed for other reasons. Section 1981 " 'protect[s] a limited category of rights' " (*General Building Contractors Association, Inc.* v. *Pennsylvania*, 458 U.S. 375, 384 (1982), quoting *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966)) that are enumerated in the statute. Petitioner does not suggest any way in which the

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[4]For example, the FTCA specifically includes "members of the military and naval forces" in its definition of "[e]mployee of the government" (28 U.S.C. 2671), thus revealing that Congress expected the torts of military officials to give rise to liability on the part of the United States in some contexts. Moreover, the FTCA contains several express exceptions, including an exception for "combatant activities of the military or naval forces * * * during time of war" (28 U.S.C. 2680(j)), but it contains no express exception for torts committed by one serviceman against another.

wrongs allegedly done to Briscoe by his superiors — the alleged failure to prevent and properly to investigate the mock lynching — are among those enumerated in Section 1981.

Section 1983 provides a cause of action only for a deprivation of a constitutional or statutory right; petitioner's complaint does not suggest that Briscoe was denied any constitutional or statutory right other than a right not to be discriminated against on the basis of race. Section 1981 also requires a showing of intentional racial discrimination. *General Building Contractors Association, Inc.* v. *Pennsylvania, supra.* Thus, petitioner must demonstrate a racially discriminatory motivation in order to prevail under either statute. But while the alleged mock lynching was evidently racially motivated in some sense, there is no basis for believing that any failure to prevent or to investigate that incident was itself based on a racially discriminatory intent. At least in these circumstances, the bare allegations of racial motivation in petitioner's complaint (at paras. 10, 15) are insufficient to require the individual respondents to face discovery and a trial. See, *e.g., Hobson* v. *Wilson,* 737 F.2d 1, 29-31 (D.C. Cir. 1984) (citing *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982)), petition for cert. pending, No. 84-1139 (filed Jan. 14, 1985).

CONCLUSION

As to the first question presented, the petition for a writ of certiorari should be disposed of as appropriate in light of the Court's decision in *United States* v. *Shearer*, No. 84-194. As to the second question presented, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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